

Articles

Domestic Violence and Animal Welfare: The Science of Human-Animal Interaction

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Introduction

REMARKABLY LITTLE IS WRITTEN about the ongoing legal transformation of the status of animals from items of property to sentient, though non-human, members of a human family. Domestic violence legislation is leading the way: recognizing society's restructuring of human-animal relations, codifying it and writing it large, and conferring on the new human-animal relations the government's stamp of approval. The process is not yet complete—domestic animals are still classified as “property” in the California Civil Code¹—but the fact remains that the dogs and cats that once inhabited our barnyards and backyards today inhabit our living rooms and bedrooms and are eligible to have their welfare protected by courts in cases of domestic violence and abuse.

In California, five code sections, enacted between 2008 and 2019, have broken new ground.² They give legal expression to a fact that

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1. CAL. CIV. CODE § 655 (West 2007).

2. CAL. FAM. CODE § 6320(b) (West 2014) (family violence); CAL. WELF. & INST. CODE § 213.5(A)(B) (West 2016) (juvenile dependency proceedings); CAL. WELF. & INST. CODE § 15675.03(B)(4)(A) (West 2017) (elder and dependent adult abuse); CAL. CIV. PROC. CODE § 527.6(A)(B)(6) (West 2018) (civil harassment); CAL. FAM. CODE § 2605 (West 2019) (animal custody awards).

other disciplines have accepted for many years: the human-animal bond exists and is occupying an increasingly central place in society. Four of these code sections empower courts to issue restraining orders, popularly known as “pet”-protection orders, for the protection of companion animals in cases of domestic violence and domestic abuse³ where the target is a domestic partner, a child, an elder, or a dependent adult. They are central to this Article. The fifth authorizes courts to issue pre-trial and final animal custody awards and is analyzed only as it relates to issues of domestic violence and abuse.

Part I of this Article provides a brief introduction to the science of human-animal interaction and the human-animal bond. Studies in the field of anthrozoology,⁴ the emerging science of human-animal interaction, have found that the human-animal bond is based on physiological processes, triggered by interaction between humans and friendly animals, that lead to reduction of stress and increase of serenity in the humans. Sociological studies have shown that an animal functions as a social lubricant, promoting the building of social networks and acquisition of social capital by its owner. These benefits, physiological and sociological, are of particular importance to persons in crisis such as domestic violence victims. A central purpose of this Article is to bring this interdisciplinary material, backed by citations to sources, to the attention of judges and lawyers for use in cases where physical custody of a companion animal is at issue.

Part II of this Article looks at the new California domestic violence and domestic abuse code sections that authorize courts to issue pet-protection orders in cases of domestic violence, child abuse, elder abuse, dependent-adult abuse and civil harassment (stalking). The focus is on their legislative history. Does the legislation constitute a recognition of the need to protect the human-animal bond, much as the law protects the parent-child bond? Is the legislation sufficient to the needs of the humans who are victims of domestic violence and abuse? The answers appear straightforward. The legislature recognized the

3. *Domestic Violence*, BLACK'S LAW DICTIONARY (10th ed. 2014). The word “domestic” is here used in its sense “Of, relating to, or involving the family or the household.” Used in this way, the phrase ‘domestic abuse’ encompasses elder abuse, child abuse and dependent adult abuse, though not civil harassment (stalking). *See also Domestic*, THE OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/56663?redirectedFrom=domestic#eid> [<https://perma.cc/M5Q9-MKYE>] (“relating to the running of a home or to family relations”).

4. *See Anthrozoology*, THE ENCYCLOPEDIA OF APPLIED ANIMAL BEHAVIOUR AND WELFARE 28–30 (Daniel S. Mills et al. eds., 2010); *see generally* SAMANTHA HURN, HUMANS AND OTHER ANIMALS: CROSS-CULTURAL PERSPECTIVES ON HUMAN-ANIMAL INTERACTIONS (2012).

phenomenon of human-animal bonding and intended to protect the parties to it. However, the legislation is insufficient to meet the needs of domestic violence victims because it fails to define animal welfare, the absence of which gives grounds for issuance of a restraining order. Part II concludes the statutory material by proposing language for a code amendment that creates a civil definition of animal abuse.

Part III supports the proposed civil definition of animal abuse by considering the law's current concepts of animal abuse and animal welfare, tracing their evolution from nineteenth century New York legislation having its origin in one man's desire to protect a carriage horse⁵ through the twentieth century's animal rights movement to the present day's belief that domesticated animals should be free to express their natural behaviors. Particular attention is given to the work of philosopher Martha Nussbaum, who proposes a standard akin to freedom-to-utilize-natural-capabilities as a gauge against which to determine whether an animal is being subjected to abuse.⁶ Nussbaum's standard for animal welfare is used to support this Article's proposed amendment to California's recently-enacted code sections.⁷

The conclusion of this Article predicts that the immediate effect of the new California domestic violence and pet-protection-order legislation will be public and official recognition of the need for additional support services, especially shelter, for victims of domestic abuse who are fleeing with their companion animals. Funding will be a major concern. In the longer-term future, evolving public views on the role of companion animals in social and family life will require the law to change even more than it has already, to the point where animals are viewed as sentient beings having legally protectable interests rather than as items of property.

I. The Science of Human-Animal Interaction

Recent advances in science and the humanities underpin, and to some extent have caused, the tentative movement in family law toward viewing strong human attachments to particular animals as something more than simple fondness for animals. Central to these advances is the work done in the new science of anthrozoology, which pulls together findings from human psychology, animal ethology, and

5. *History of the ASPCA*, AM. SOC'Y PREVENTION CRUELTY TO ANIMALS, <https://www.asPCA.org/about-us/history-of-the-aspca> [<https://perma.cc/GD8X-82ZU>].

6. See generally MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 327 (First Harvard University Press ed. 2007).

7. *Id.* at 347.

medicine, both human and veterinary, to construct a coherent body of scientific theory and recognized practice.⁸ Of first importance within anthrozoology is the work done in human and veterinary medicine and psychology on the biological basis of the human-animal bond.

A. The Human-Animal Bond

An often-cited definition of the human-animal bond is that of the American Veterinary Medical Association: the human-animal bond is “a mutually beneficial and dynamic relationship between people and other animals that is influenced by behaviors that are *essential* to the health and well-being of both.”⁹ The term “human-animal bond” was pioneered in 1935¹⁰ by Konrad Lorenz, a famous ethologist, and Boris Levinson, a psychotherapist considered by many to be the father of animal-assisted therapy.¹¹ Another famous psychotherapist, Carl Jung, wrote “Because they are so closely akin to us . . . I loved all warm-blooded animals who have souls like ourselves and with whom, so I thought, we have an instinctive understanding.”¹² Going even further back in time, concern for animals has been part of the Western tradition of ethics since the days of Aristotle.¹³ Aristotelians argued that nature is a continuum and all creatures are worthy of respect and “even wonder.”¹⁴ Returning to the present, Alan Beck, Professor of Animal Ecology at Purdue University, posited that the term “bond,” as

8. See *Anthrozoology*, *supra* note 4; see generally HURN, *supra* note 4.

9. John Wright, *The Human-Animal Bond: What is it? What is the Veterinarian's Role?*, AM. ASSOC. OF HUMAN-ANIMAL BOND VETERINARIANS (AAHABV, Okemos, MI), 2001, NEWSLETTER at 1, 2 (emphasis added).

10. See Konrad Z. Lorenz, *The Companion in the Environment of Birds*, 54 THE AUK 245, 260 (1937) (English version); see also Linda M. Hines & Delta Soc'y, *Historical Perspectives on the Human-Animal Bond*, 47 AM. BEHAV. SCIENTIST 7, 7–8 (2003).

11. Aubrey H. Fine & Alan M. Beck, *Understanding Out Kinship with Animals: Input for the Health Care Professionals Interested in the Human-Animal Bond*, in HANDBOOK ON ANIMAL-ASSISTED THERAPY: FOUNDATIONS AND GUIDELINES FOR ANIMAL-ASSISTED INTERVENTIONS 3, 5 (Aubrey H. Fine ed., 4th ed. 2015). Lorenz is reputed to have said that the desire to keep an animal usually arises from a longing for a bond with nature. See *id.* Lorenz may have been a precursor of E.O. Wilson's theory of biophilia—the innate desire of humans to understand and connect to nature. See generally EDWARD O. WILSON, BIOPHILIA: THE HUMAN BOND WITH OTHER SPECIES (1984) (citing how Wilson's book on biophilia is used as evidence that Lorenz was influenced by Wilson in regards to the human-animal bond).

12. C. G. JUNG, MEMORIES, DREAMS, REFLECTIONS 67 (Aniela Jaffé, ed., Richard Winston & Clara Winston, trans, 1963).

13. See generally NUSSBAUM, *supra* note 6, at 347–50.

14. *Id.* at 348.

in human-animal bond, is derived from the terminology used to describe the relationship between parents and children.¹⁵

The human-animal bond manifests itself in several ways. The first manifestation to come to mind is the psychological dependence of some persons on their companion animals. Through most of the twentieth century the tendency was to view such dependence as eccentric or, worse, neurotic. Leona Helmsley's bequest of \$12 million to her Maltese lap dog, Trouble, is often cited as an example.¹⁶ But times have changed. Nowadays newspaper columnists and health pundits alike tout the benefits of companion animals for lonely or stressed people.¹⁷

B. The Effects of Human-Animal Interaction

The genesis of this about-turn was a small study published roughly forty years ago by a group of medical professionals. The study of a small sample of post-operative cardiac patients reached the conclusion that companion animals support human well-being in three ways: decreasing loneliness and depression; reducing stress and anxiety; and providing a stimulus for exercise.¹⁸ Clinical studies to test the hypothesis soon followed, most observing the same or similar results.¹⁹

1. Decreasing Loneliness and Depression

First, loneliness. Loneliness decreases when an isolated person acquires an animal whom he or she sees as a family member or at a minimum as a substitute for other people.²⁰ This result is achieved by

15. Alan M. Beck, *Companion Animals and Their Companions: Sharing a Strategy for Survival*, 19 BULL. SCI., TECH. AND SOC'Y 281, 281 (1999).

16. Cara Buckley, *Cosseted Life and Secret End of a Millionaire Maltese*, N.Y. TIMES (June 9, 2011), <https://www.nytimes.com/2011/06/10/nyregion/leona-helmsleys-millionaire-dog-trouble-is-dead.html> [<https://perma.cc/SUZ9-9WKS>].

17. Mark Bekhoff, *Companion Animals Help People with Mental Health Problems*, PSYCHOLOGY TODAY (Feb. 10, 2018), <https://www.psychologytoday.com/us/blog/animal-emotions/201802/companion-animals-help-people-mental-health-problems> [<https://perma.cc/M23G-EPT2>].

18. See Erika Friedmann et al., *Animal Companions & One-Year Survival of Patients After Discharge from a Coronary Care Unit*, 95 PUB. HEALTH REPS. 307, 310–11 (1980); see also PHIL ARKOW, ANIMAL ASSISTED THERAPY AND ACTIVITIES: A STUDY AND RESEARCH RESOURCE GUIDE FOR THE USE OF COMPANION ANIMALS IN ANIMAL-ASSISTED INTERVENTIONS (11th ed., 2015).

19. See, e.g., Stewart B. Fleischman et al., *Beneficial Effects of Animal-Assisted Visits on Quality of Life during Multimodal Radiation-Chemotherapy Regimens*, 13 J. CMTY. & SUPPORTIVE ONCOLOGY 22, 24–26 (2015).

20. See Bert N. Uchino, *Social Support and Health: A Review of Physiological Processes Potentially Underlying Links to Disease Outcomes*, 29 J. BEHAV. MED. 377, 377 (2006); Ann L. Coker et al., *Social Support Protects Against the Negative Effects of Partner Violence on Mental Health*, 11 J.

a process in which the owners of companion animals project onto them human feelings, motives, and qualities, often receiving from them a level of social support similar to that which a human could provide.²¹ The result is the tendency, widely shared in the twenty-first century, to view companion animals as family members.²²

Next, depression. The disease of depression is a more serious matter than mere loneliness. Relieving depression is a complex endeavor, often requiring the use of medications traditionally thought to regulate the chemistry of the brain.²³ In general, their operation has to do with regulation of the “happiness” neuro-chemicals: oxytocin, dopamine, endorphin, and serotonin.²⁴ The effectiveness of these medications has long been questioned.²⁵ It is reasonable, then, to seek to treat depression by non-medical means which have been shown to

WOMEN'S HEALTH & GENDER-BASED MED. 465, 472–74 (2002); Erika Friedmann et al., *Perceptions of Animals & Cardiovascular Responses During Verbalization with an Animal Present*, 6 ANTHROZOÏS 115, 115 (1993).

21. Marguerite O'Haire, *Companion Animals and Human Health: Benefits, Challenges, and the Road Ahead*, 5 J. VETERINARY BEHAV. 226, 226–32 (2010).

22. See, e.g., *People are including pets in their financial plans*, THE ECONOMIST (Oct. 11, 2018), <https://www.economist.com/finance-and-economics/2018/10/11/people-are-including-pets-in-their-financial-plans> [<https://perma.cc/58EP-GB9E>]; see also Ann Ottney Cain, *A Study of Pets in the Family System*, in NEW PERSPECTIVES ON OUR LIVES WITH COMPANION ANIMALS 72, 72–82 (Aaron Honori Katcher & Alan M. Beck ed., 1983).

23. *What causes depression?*, HARV. HEALTH PUB., <https://www.health.harvard.edu/mind-and-mood/what-causes-depression> [<https://perma.cc/2NS9-53TC>] (last updated June 24, 2019); see generally Chittaranjan Andrade & N. Sanjay Kumar Rao, *How Antidepressant Drugs Act: A Primer on Neuroplasticity as the Eventual Mediator of Antidepressant Efficacy*, 52 INDIAN J. PSYCHIATRY 378–86 (2010). The mechanisms by which these medications operate are beyond the scope of this paper.

24. See generally E. Pearce, Rafael Wlodarski, Anna Machin & Robin I.M. Dunbar, *Variation in the Beta Endorphin, Oxytocin, and Dopamine Receptor Genes Is Associated with Different Dimensions of Human Sociality*, 114 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES OF THE U.S. (PNAS) 5300 (2017); E. Pearce, Rafael Wlodarski, Anna Machin & Robin I.M. Dunbar, *Reply to Jern et al.: On Asking the Right Questions*, PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES OF THE U.S. (PNAS) (Oct. 31, 2017), https://pdfs.semanticscholar.org/e833/49217d414b66ba4e61392a447da863248802.pdf?_ga=2.220825820.598735293.1566282110-765065161.1566282110 [<https://perma.cc/74HR-7GFU>]; see generally Raphaëlle Mottolèse, Jérôme Redouté, Nicolas Costes, Didier Le Bars & Angela Sirigu, *Switching Brain Serotonin with Oxytocin*, 111 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES OF THE U.S. (PNAS) 8637 (2014).

25. See, e.g., Aurelia Viglioni et. al., *Predicting antidepressant treatment outcome based on socioeconomic status and citalopram dose*, THE PHARMACOGENOMICS J. (Feb. 9, 2019), <https://doi.org/10.1038/s41397-019-0080-6> [<https://rdcu.be/bO8Q4>]; Aaron E. Carroll, *Do Antidepressants Work?*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/upshot/do-antidepressants-work.html>; but see generally Andrea Cipriani, et. al., *Comparative efficacy and acceptability of 21 antidepressant drugs for the acute treatment of adults with major depressive disorder: a systematic review and meta-analysis*, 391 THE LANCET 1357–66 (2018).

elevate levels of these same “happiness” neurochemicals.²⁶ One such non-medical means is possession of a companion animal. Time spent interacting with one’s dog can, even without medication, stimulate the production of oxytocin.²⁷ And at least one of the oxytocin studies has shown that, even without medication, levels of endorphins and dopamine also increased after interaction with a companion animal.²⁸

At the other end of the leash, preliminary studies have shown that oxytocin rises in dogs interacting with their owners.²⁹

2. Reducing Stress and Anxiety

Stress and anxiety were shown to decrease in a study of eighteen subjects gently stroking and talking to their pet dogs. The subjects’ levels of oxytocin almost doubled and their blood pressures went down, as did their levels of cortisol.³⁰ Subsequent research focusing on other indicia of stress and anxiety such as elevated heart rate and blood pressure showed that interacting with familiar friendly animals reduced these conditions.³¹ Other minor ailments frequently attrib-

26. See Loretta Graziano Breuning, *Stimulating Dopamine, Serotonin, Oxycontin and Endorphins by Learning How They’re Stimulated in Animals*, J. OF MEDICAL-CLINICAL RES. & REVIEWS (July 11, 2018), https://www.researchgate.net/publication/330782045_Stimulating_Dopamine_Serotonin_Oxytocin_and_Endorphin_by_Learning_How_They're_Stimulated_in_Animals [https://perma.cc/M5TP-DYCE].

27. Andrea Beetz et al., *Psychosocial and Psychophysiological Effects of Human-Animal Interactions: The Possible Role of Oxytocin*, 3 FRONTIERS IN PSYCHOL. July 2012, at 1, 12; Suzanne C. Miller et al., *An Examination of Changes in Oxytocin Levels in Men & Women Before & After Interaction with a Bonded Dog*, 22 ANTHROZOÖS 31 (2009); J.S.J. Odendaal & R. Meintjes, *Neurophysiological Correlates of Affiliative Behavior Between Humans & Dogs*, 165 VETERINARY J. 296, 299 (2003); see also J.S.J. Odendaal, *Animal Assisted Therapy: Magic or Medicine?*, 49 J. PSYCHOSOMATIC RES. 275, 278 (2000).

28. Odendaal & Meintjes, *supra* note 27, at 299.

29. Kerstin Uvnas-Moberg et al., *Promises and Pitfalls of Hormone Research in Human-Animal Interaction*, in HOW ANIMALS AFFECT US: EXAMINING THE INFLUENCE OF HUMAN-ANIMAL INTERACTION ON CHILD DEVELOPMENT AND HUMAN HEALTH 53, 53–81 (Peggy McCordle et al. eds., 2011).

30. Odendaal & Meintjes, *supra* note 27, at 298; see Beetz, *supra* note 27, at 7–8; see also Odendaal, *supra* note 27, at 278 (discussing the physiology of positive human-animal interaction).

31. See, e.g., Robert Viau et al., *Effect of Service Dogs on Salivary Cortisol Secretion in Autistic Children*, 35 PSYCHONEUROENDOCRINOLOGY 1187, 1190–92 (2010); see also Chia-Chun Tsai et al., *The Effect of Animal-assisted Therapy on Stress Responses in Hospitalized Children*, 23 ANTHROZOÖS 245, 250–54 (2010); Kathie M. Cole et al., *Animal-Assisted Therapy in Patients Hospitalized with Heart Failure*, 16 AM. J. CRITICAL CARE 575, 582–84 (2007); Sandra B. Barker et al., *Measuring Stress and Immune Response in Healthcare Professionals Following Interaction with a Therapy Dog: A Pilot Study*, 96 PSYCHOL. REP. 713, 723–26 (2005); Sunny Lyn Nagengast et al., *The Effects of the Presence of a Companion Animal on Physiological Arousal and Behavioral Distress in Children During a Physical Examination*, 12 J. PEDIATRIC NURSING 323, 327–28 (1997).

uted to stress have been shown to be reduced by association with a companion animal.³² On the psychological front, there is anecdotal evidence that animals can make a human feel safer,³³ thus also reducing stress and anxiety. Needless to say, the loss of a companion animal and with it the physiological and psychological benefits the animal brings would hit a survivor of domestic violence hard, right when he or she most needs both the animal and its associated benefits.

3. Stimulating Exercise

Pedestrian though it may seem, next on the list of ways companion animals increase well-being is exercise. At the most basic level, the need to walk one's dog requires that a person leave the confines of his or her home or apartment and walk the streets of the neighborhood, with the benefits of cardiovascular fitness and weight loss that walking entails.³⁴ To the end of better health, several epidemiological surveys have found a correlation between owning pets and exercise, finding people who own pets exercise more than people who do not own pets or who own different sorts of pets.³⁵ (On the other hand, even cat-owners and bird-owners sometimes "walk" their pets.³⁶) Not least in importance is the fact that time spent walking and playing with a companion animal brings with it not just cardiovascular fitness, but also all the physiological and psychological benefits discussed above.

32. James Serpell, *Beneficial Effects of Pet Ownership on Some Aspects of Human Health*, 84 J. ROYAL SOC'Y OF MED. 717, 718–19 (1991) (showing headaches, indigestion and aching joints are among the minor ailments shown to be reduced in this study of 71 persons who adopted a dog or cat from an animal shelter). Persons who adopted a dog or cat from a shelter reported fewer minor illnesses such as these one month after adopting the animal. *Id.* Dog adopters maintained the decrease in minor health problems over the ten months of the study; cat adopters did not. *Id.*

33. Alan M. Beck & Aaron H. Katcher, *Future Directions in Human-Animal Bond Research*, 47 AM. BEHAV. SCIENTIST 79, 83 (2003). "The symbolic role of animals in society may be as important as the physiological impact on people. For example, many police forces carry teddy bears in their cruisers as part of their trauma kits." *Id.*

34. See generally Adrian Bauman et al., *International Perspectives on the Epidemiology of Dog Walking*, in THE HEALTH BENEFITS OF DOG-WALKING FOR PETS & PEOPLE: EVIDENCE & CASE STUDIES 39 (Rebecca A. Johnson et al. eds., 2011)

35. See generally John R. Sirard et al., *Dog Ownership & Adolescent Physical Activity*, 40 AM. J. PREVENTIVE MED. 334, 336 (2011); Maria Müllersdorf et al., *Aspects of Health, Physical/Leisure Activities, Work and Socio-Demographic Associated with Pet Ownership in Sweden*, 38 SCANDINAVIAN J. PUB. HEALTH 53, 56 (2010); Koichiro Oka & Ai Shibata, *Dog Ownership & Health-Related Physical Activity Among Japanese Adults*, 6 J. PHYSICAL ACTIVITY & HEALTH 1, 6 (2009).

36. *How to Walk Your Cat (and Live to Tell About It)*, PETMD, https://www.petmd.com/cat/training/evr_ct_how_to_walk_you_walk_your_cat [https://perma.cc/PG5M-EL4W]; Linda Roberts, *Taking Your Pet Birds Outside*, BIRD MED. & SURGERY, <https://www.birdmedicineandsurgery.com/outside.php> [https://perma.cc/Z6FD-U8E4].

Perhaps even more importantly for victims of domestic violence, during a walk, animals of any species function as social lubricants who serve as catalysts for social engagement, enabling people to meet one another on a spectrum ranging from incidental social interactions to formation of friendships.³⁷ Regular walks in one's neighborhood or another friendly venue such as a dog park promotes the building of social capital within a community.³⁸ For a person who is a victim of hidden domestic violence, the social capital thus developed can tip the balance of a decision to remain silent or report, to stay or leave.³⁹

The major contributions to understanding the human-animal bond have been in anthrozoology, the science of human-animal interactions. Medical professionals and clinical psychologists have unpacked human attachments to their companion animals, finding they are not based in eccentricity or mere fondness for animals, but rather in deep physiological and psychological processes.⁴⁰ It is, therefore, important to keep a bonded human-animal pair together in time of crisis. It is precisely in a time of crisis, when the human may feel alone in the world save for his or her canine or feline friend, that the bond is perhaps most needed and most relied-upon.

II. The Statutes: Domestic Violence, Elder Abuse, and Child Abuse

Since the last third of the twentieth century, humans have been protected by the law against the violence, at times, attendant on the

37. Lisa Wood et al., *The Pet Connection: Pets as a Conduit for Social Capital?*, 61 *SOC'Y SCI. & MED.* 1159, 1160–61 (2005); Lisa Wood et al., *More Than a Furry Companion: The Ripple Effect of Companion Animals on Neighborhood Interactions and Sense of Community*, 15 *SOC'Y & ANIMALS* 43, 47–51 (2007).

38. See Sirard, *supra* note 35; see also Mullersdorf, *supra* note 35.

39. See Lisa Jane Wood, *Community Benefits of Human-Animal Interactions . . . The Ripple Effect*, in *ANIMALS IN OUR LIVES: HUMAN-ANIMAL INTERACTION IN FAMILY, COMMUNITY, AND THERAPEUTIC SETTINGS* 23, 25–27 (Peggy McCardle et al. eds., 2011); see generally Bonnie E. Carlson et al., *Intimate Partner Abuse and Mental Health: The Role of Social Support and Other Protective Factors*, 8 *VIOLENCE AGAINST WOMEN* 720, 722–23 (2002).

40. The One Health movement supplies a context within which to view the benefits of human-animal interaction. For an overview of the One Health movement, see generally E. Paul J. Gibbs, *The Evolution of One Health: A Decade of Progress and Challenges for the Future*, 174 *VETERINARY REC.* 85 (2014). For a critique of the One Health movement as being anthropocentric, see Angela Cassidy, *Humans, Other Animals, and 'One Health' in the Early Twenty-First Century*, in *ANIMALS AND THE SHAPING OF MODERN MEDICINE: ONE HEALTH AND ITS HISTORIES* 193 (Abigail Woods et al. eds., 2018). Cassidy criticizes the movement for using animals and animal health (read animals without zoonotic diseases) as a tool for the real goal of promoting human health. *Id.* at 218. For a discussion of the evaluative nature of the term "animal welfare," see Michael P. Murtaugh et al., *The Science Behind One Health: At the Interface of Humans, Animals, and the Environment*, 1395 *ANNALS N.Y. ACAD. SCI.* 12 (2017).

breakup of family units and human relationships. Their companion animals, who often function as substitute targets used to manipulate the human victims, have not been protected. To remedy that situation, the California legislature recently authorized courts to extend to companion animals the protection of restraining orders issued in situations of domestic violence or threatened violence. The bills effecting the change spanned three codes and created four new code provisions. The relevant code provisions are Family Code 6320(b) (family violence), Welfare and Institutions Code 213.5(A)(B) (juvenile dependency proceedings), Welfare and Institutions Code 15675.03(B)(4)(A) (elder and dependent adult abuse), and Civil Procedure Code 527.6(A)(B)(6) (civil harassment).

Domestic violence issues usually reach the courts as the prelude to termination of a personal relationship or divorce. Other causes of action involving domestic violence and abuse of vulnerable persons in their homes arrive in court as civil actions to remove a child from the home to protect him or her from child abuse. Additionally, civil actions are filed to prevent elder abuse, or actions to prevent civil harassment such as stalking. In all these situations, protection for companion animals has only recently appeared on the canvas of the law.

A. Domestic Violence and “Pet”-Protection Orders: California Family Code 6320(b)

As every family lawyer knows, a victim’s major weapon in the attempt to prevent or stop domestic violence is a restraining order issued in the preliminary stages of litigation to dissolve a marriage or personal relationship, known as an Order after Hearing when it becomes permanent. Courts have the power, under the Family Law Act, to order a respondent to cease conduct that disturbs the peace of petitioner, to stay away from petitioner, and even to order respondent to vacate the family home.⁴¹ In 2008, by adding section 6320(b) to the

41. CAL. FAM. CODE § 6320(a) (West 2014) (“The court may issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating as described in Section 528.5 of the Penal Code, falsely personating as described in Section 529 of the Penal Code, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.”) The court may also order that a party remove him- or herself from the family home. CAL. FAM. CODE § 6321 (West 2013).

Family Code, the California legislature gave courts an additional power—to order respondent to refrain from conduct that threatens the welfare of the companion animal of petitioner or a minor child in his or her household.⁴²

The launching pad for California Family Code 6320(b) was Senate Bill 353 (“SB 353”).⁴³ SB 353 responded to a growing perception among the public and law enforcement professionals that animal abuse and human abuse were linked⁴⁴ and that abuse and threatened abuse of companion animals was being used in the domestic context to manipulate humans who loved their animals.⁴⁵ The underlying dynamic that made the coercion and abuse possible was the strong attachment between the human victim and his or her companion animal, an attachment known in other fields as the human-animal bond.

Senate Bill 353 included the following language:

SECTION 1. The Legislature finds and declares the following:

- (a) There is a correlation between animal abuse, family violence, and other forms of community violence.
- (b) According to the California Department of Justice, California law enforcement received 181,362 domestic violence calls in 2005.
- (c) Perpetrators often abuse animals in order to intimidate, harass, or silence their human victims.

42. CAL. FAM. CODE § 6320(b) (West 2014). The intent of the legislature was that such orders would not stand alone but would be linked to other restraining orders issued on behalf of petitioner. S. Judiciary Comm., Analysis of S.B. 353, at 6 (2007–2008 Reg. Sess.) (Ca. 2007).

43. S.B. 353, 2007–2008 Leg. Sess., Reg. Sess. (Ca. 2007).

44. E.g., ALLIE PHILLIPS, UNDERSTANDING THE LINK BETWEEN VIOLENCE TO ANIMALS AND PEOPLE, 5 (2014). In non-legal fields that deal with human-animal interactions, the connection between animal abuse and human abuse is often referred to as “The Link.” *Id.*

45. S. Judiciary Comm., *supra* note 42. Animal abuse can be both a precursor to and a companion of domestic violence, child abuse, elder abuse and interpersonal harassment. See JOAN E. SCHAFFNER, AN INTRODUCTION TO ANIMALS AND THE LAW 28–29 (2011). The National Council of Juvenile and Family Court Judges attested to the connection as early as 2010, finding that the threat or use of violence against a victim’s companion animal was often used by abusers to punish or manipulate victims. See Cal. Assemb. Floor Analysis of A.B. 494 (2015–2016 Reg. Sess.) (Ca. 2015) (relying on Sherry Ramsey et al., *Protecting Domestic Violence Victims by Protecting Their Pets*, 19 JUV. & FAM. JUST. TODAY 17 (2010), <https://awionline.org/sites/default/files/uploads/legacy-uploads/documents/DV-NCJFCJArticleSpring2010-040611-1302122112-document-38932.pdf> [https://perma.cc/CSA4-KJ67]). See also Frank R. Ascione et al., *Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and Non-battered Women*, 13 VIOLENCE AGAINST WOMEN 354, 355 (2007). Cf. Anne M. Volant et al., *The Relationship Between Domestic Violence and Animal Abuse: An Australian Study*, 23 J. OF INTERPERSONAL VIOLENCE 1277, 1288–90 (2008).

(d) A survey of pet-owning families with substantiated child abuse and neglect found that animals were abused in 88 percent of homes where child physical abuse was present;

(e) A 1997 survey of fifty of the largest shelters for battered women in the United States found that 85 percent of women and 63 percent of children entering shelters discussed incidents of pet abuse in the family;

(f) A study of women seeking shelter at a safe house showed that 71 percent of those having pets affirmed that their partner had threatened, hurt, or killed their companion animals.

(g) Another study showed that violent offenders incarcerated in a maximum-security prison were significantly more likely than nonviolent offenders to have committed childhood acts of cruelty toward pets.

(h) In many communities across California and the United States, human services, animal services, and law enforcement agencies are sharing resources and expertise to address violence, including engaging in cross-training and cross-reporting through interagency partnerships.⁴⁶

The text of California Family Code 6320(b) follows:

(b) On a showing of good cause, the court may include in a protective order a grant to the petitioner of the exclusive care, possession, or control of any animal⁴⁷ owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent. The court may order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal.⁴⁸

The carefully-worded subsection is a welcome addition to the Family Code. Unfortunately, it alone is insufficient to provide domestic violence victims with the protection the legislation intended, because the statutory scheme surrounding section 6320(b) is missing a central ele-

46. S.B. 353, 2007–2008 Leg., Reg. Sess. (Cal. 2007)

47. CAL. FAM. CODE § 6320(b) (West 2013). Although the language reads “any animal,” California Family Code section 6320(b) has in practice been largely used to protect companion animals, popularly known as pets, rather than livestock or other farm animals. Rebecca F. Wisch, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders*, ANIMAL CTR. (2017), <https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders> [https://perma.cc/BW8E-LJMU]. For this reason, court orders protecting companion animals have become known among animal advocates and the public generally as “Pet Protection Orders” or PPOs. *Id.* Because scholars in related non-legal fields tend to object to the term “pet,” this Article will refer to the animals involved in protective orders as “companion animals” or simply “animals.”

48. CAL. FAM. CODE § 6320(b) (West 2013).

ment: a description of the conduct that provides “good cause” for issuance of “pet protection orders” under Sec. 6320(b).

Under the California Domestic Violence Prevention Act, the term “domestic violence” is limited and defined by three Family Code sections: 6203, 6211 and 6320(a). Section 6203 defines the abuses that constitute domestic violence and provide a basis for issuance of a restraining order.⁴⁹ Section 6211 describes the relationships between the victim and the perpetrator that must be present in order for an incident of abuse to fall within the purview of the Domestic Violence Prevention Act.⁵⁰ Section 6320(a) describes the types of conduct that a family court may enjoin. The conduct includes, but is not limited to, such categories as molestation, battery, sexual assault, destruction of personal property and disturbing the peace of another party.⁵¹

Nowhere in section 6203 of the Family Code, “Abuse Defined,” is there a mention of abuse of petitioner’s companion animal. Therefore, under the current statutory scheme, the petitioner must show that the conduct directed at the animal somehow constituted abuse of him or her. For example, petitioner must show that abuse of the animal “place[d] [her] in reasonable apprehension of imminent serious bodily injury to [herself] or to another”⁵² or that the abuse “disturb[ed] [her] peace” or was “behavior that has been or could be enjoined pursuant to Section 6320.”⁵³

A better route is hinted at in *People v. Kovacich*,⁵⁴ the only case even arguably relevant to this statutory deficit. In *Kovacich* the Fourth Appellate District reasoned that a husband’s conduct of kicking the family dog, which died, in front of his wife and children was admissible in his subsequent trial for the murder of wife as a prior instance of domestic abuse under Family Code section 6203.⁵⁵ It is regrettable

49. CAL. FAM. CODE § 6203 (West 2016) (defining abuse).

50. See CAL. FAM. CODE § 6211 (West 2013). The list of persons at risk of abuse and for whose protection a restraining order might therefore be issued includes a spouse or former spouse, a cohabitant or former cohabitant, a person with whom the respondent has or has had a dating or engagement relationship, a person with whom the respondent has had a child, a child of a party, or any other person related by consanguinity or affinity within the second degree. *Id.* Section 6320(a) adds to the list by providing “in the discretion of the court, on a showing of good cause,” these orders can also be issued to preserve the peace of mind “of other named family or household members.” CAL. FAM. CODE § 6320(a) (West 2013).

51. CAL. FAM. CODE § 6320(a) (West 2013).

52. § 6203(a)(3).

53. § 6203(a)(4).

54. *People v. Kovacich*, 201 Cal. App. 4th 863 (2011).

55. *Id.* at 895.

that the court did not take the further step of explicitly inviting the legislature to define abuse of companion animals as a form of domestic violence under the Domestic Violence Prevention Act.

This Article, by issuing just such an invitation to the legislature, takes that next step at which the Fourth Appellate District only hinted. What is needed is a legislative declaration that abuse of a companion animal constitutes abuse of the person who is bonded to that animal.⁵⁶

B. Child Abuse and Neglect, Elder Abuse, Dependent Adult Abuse, and Civil Harassment

Concern over the correlation between animal abuse and family abuse⁵⁷ continued and was in large part responsible for the 2016 enactment of code sections providing for animal protective orders in cases of child abuse, elder abuse, dependent adult abuse, and civil harassment (stalking).⁵⁸ Also responsible was the steadily increasing public interest in and appreciation for the contributions of companion animals to members of vulnerable groups.

The sections of the California Welfare and Institutions Code dealing with juvenile dependency proceedings,⁵⁹ elder abuse and dependent-adult abuse proceedings,⁶⁰ and civil harassment cases⁶¹ were all amended in 2015, effective January 1, 2016, to include restraining-order protection for the animals of petitioners or their guardians ad litem. All contain the following language, substantially similar to that of the 2008 amendment to the Family Code discussed above in Part II(A):⁶²

On a showing of good cause, in an order issued pursuant to this subparagraph in connection with an animal owned, possessed, leased, kept, or held [by a person protected by the restraining order] [the petitioner], or residing in the residence or household of [a person protected by the restraining order] [the petitioner], the court may do either or both of the following:

56. See *infra* Section II.D.

57. See, e.g., Frank R. Ascione et al., *Animal Abuse and Developmental Psychopathology: Recent Research, Programmatic and Therapeutic Issues and Challenges for the Future*, in HANDBOOK ON ANIMAL-ASSISTED THERAPY: THEORETICAL FOUNDATIONS AND GUIDELINES FOR PRACTICE 357, 373 (Aubrey H. Fine eds., 3d ed., 2010).

58. See Assemb. Judiciary Comm., Analysis of A.B. 494 (2015–2016 Reg. Sess.), Apr. 3, 2015, at 10; A.B. 1081, 2015–2016 Leg. Reg. Sess. (Cal. 2015).

59. CAL. WELF. & INST. CODE § 213.5(A)(B) (West 2016).

60. CAL. WELF. & INST. CODE § 15657.03(B)(4)(A) (West 2017).

61. CAL. CIV. PROC. CODE § 527.6(b)(6)(A) (West 2018).

62. CAL. FAM. CODE § 6320(b) (West 2014).

- (i) Grant the [applicant] [petitioner] exclusive care, possession, or control of the animal.
- (ii) Order the [restrained person] [respondent] to stay away from the animal and refrain from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal.⁶³

Each of the legislative developments of 2015-2016 deserves an article of its own. The extension of legal protection for the human-animal bond to the fields of juvenile and adult dependency law, elder abuse, and civil harassment (stalking) is noted here to demonstrate the continuing vitality of the social movement to increase the status of animals and the legislative effort to legitimate that movement by giving it the protection of law.

Like the Family Code, the Welfare and Institutions Code and the Civil Procedure Code lack a definition for civil animal abuse. Such a section is needed to clarify what constitutes good cause for the issuance of the newly-authorized animal protection orders. Suggestions for the wording of the necessary code sections are offered in Part II(D) of this Article.

C. Legislative Intent

Two questions are posed in the Introduction to this Article. The first is whether the California code amendments of 2008 and 2016 indicated legislative intent to recognize and provide protection for the human-animal bond. A close reading of the Senate and House bill mandates the conclusion that the legislature did intend the human-animal bond to be recognized and protected, at least in the context of domestic violence and domestic abuse. The very predicate for the legislation was recognition that the psychological attachment of humans to their companion animals, otherwise known as the human-animal bond, was being used to prevent the human partners to the bond from seeking safety. Section 1 of Senate Bill 353 states the legislative finding that “Perpetrators often abuse animals to intimidate, harass or silence their human victims.”⁶⁴ The Senate Judiciary Committee in 2007 listed among the arguments in support of the bill the fact that “university studies, coupled with surveys of domestic violence shelters

63. CAL. WELF. & INST. CODE § 213.5(A)(B) (the Welfare and Institutions Code section 213.5 (juvenile proceedings) uses the terms “applicant” and “person protected by the restraining order”); CAL. WELF. & INST. CODE § 15657.03 (the Welfare and Institutions Code section 15657.03 (elders and dependent adults) uses the term “petitioner”); CAL. CIV. PROC. CODE § 527.6 (the Code of Civil Procedure section 527.6 (civil harassment) uses the term “petitioner”).

64. S.B. 353, *supra* note 43.

and animal welfare organizations, show that abusers often threaten, injure or kill pets as a way of controlling others in the family.”⁶⁵ In 2015, the author of Assembly Bill 494, which extends the protection of companion animal restraining orders to elders, juveniles, and victims of civil harassment, was quoted as stating:

As animal abuse is often correlated with family violence, many people who abuse their family members and intimate partners also threaten, injure or kill their victims’ pets, as an effective way to intensify the effects of their abusive behavior. AB 494 seeks to . . . help abused elders, abused children and stalking victims to ensure the safety and wellbeing of their pets after a restraining order has been granted.⁶⁶

Legislative intent to protect the human-animal bond from abuse is easily inferred from these and other pieces of legislative history.

The second question is whether the new companion-animal restraining order legislation is sufficient to meet the needs of the women, children, elders, dependent adults and stalking victims who are victims of domestic violence and abuse. The answer is unfortunately that the legislation is not sufficient due to the absence of a legislative statement that companion animal abuse constitutes grounds for issuance of a restraining order.

D. Amending the Codes: The Need for a Civil Definition of Animal Abuse

Animal abuse and animal welfare are flip sides of the same coin. Defining what constitutes abuse requires a standard of welfare against which to judge the behavior in question. Society’s standards of companion-animal welfare have altered radically in recent decades, in line with the growing tendency of the public to view companion animals as family members rather than as property.⁶⁷ The growth of the pet-supplies industry, along with the proliferation of veterinary practices offering human-like services such as annual wellness checks, annual teeth-cleaning, and end-of-life care attest to the trend.

Any new legislation touching on companion animals should, where appropriate, reflect these evolving social norms of animal welfare. The California legislature has indicated, in its recent code amendment relating to animal custody, that it is willing to do so.⁶⁸

65. S. Judiciary Comm., *supra* note 42.

66. Assemb. Judiciary Comm., *supra* note 58, at 3.

67. *People are including pets in their financial plans*, *supra* note 22.

68. CAL. FAM. CODE § 2605 (West 2019) (One such sign is the inclusion of “veterinary care” in recently-enacted California Family Code Section 2605(c)’s listing of the elements

Another opportunity now presents itself in the context of the statutory framework surrounding pet protection orders. A code amendment defining animal abuse is needed to make the statutory scheme work.

Two options present themselves. The first is to align the new code sections defining animal abuse with the Penal Code. The second is to adopt a new definition of animal abuse more suitable to the parameters of a civil action.

California Penal Code section 597 lists a broad range of criminal behaviors constituting animal cruelty and animal abuse. The acts criminalized range from killing an animal to tormenting it to depriving it of necessary food, drink, or shelter to “in any manner abus[ing] [it] . . .”⁶⁹ In favor of adopting Penal Code section 597’s listing of criminal acts as a definition of animal abuse is that doing so limits judicial discretion and is not likely to engender public protest. Perhaps for these reasons, the drafters of California Family Code Section 2605, the very recently-enacted Family Code section on awards of companion-animal custody, included “prevention of acts of harm or cruelty, as described in Section 597 of the Penal Code” in their definition of “care.”⁷⁰ It is indeed difficult to argue that a respondent who had performed acts of animal cruelty and abuse reaching the level of a crime should be awarded custody of that very same animal.

Nonetheless, it is inadvisable to define good cause for issuance of a domestic violence/domestic abuse civil restraining order solely in terms of conduct that would constitute a crime if proved. The bar for a finding of civil animal abuse should be set lower. Penal Code section 597 is not helpful because it uses, without defining, the very term for which a civil definition is needed: “abuse.”⁷¹ The goal in a civil case is not to convict of a crime but to enjoin antisocial conduct before, not after, it reaches the level of a crime. To succeed in such an endeavor requires a civil definition of animal abuse to be applied in the considered exercise of judicial discretion.

of care to be provided to “pet animals,” who are in turn described as “household pet[s]”). The inclusion of veterinary care provides a stamp of legislative approval for the increased use of veterinary services for companion animals, some of whose owners still do not avail themselves of such services.

69. CAL. PENAL CODE § 597(a) (West 2012) (“[E]very person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of a crime.”).

70. CAL. FAM. CODE § 2605 (stating “‘Care’ includes, but is not limited to, the prevention of acts of harm or cruelty, as described in Section 597 of the Penal Code, and the provision of food, water, veterinary care, and safe and protected shelter.”)

71. Cal. Penal Code § 597(a).

What is needed to make the statutory scheme relating to pet-protection orders effective is a definition of animal abuse flexible enough to encompass the many different situations involving the wide variety of species that fall under the rubric “pet.” The problem is that dogs, cats, parakeets, garden snakes, goldfish and geckos are all, technically speaking, “animals.”⁷² Pity the poor judge or lawyer who must determine whether a goldfish or gecko has been abused. Nonetheless, because the class of creatures who are pet animals is so large and so diverse, the best option is to go with a standard rather than an endless series of bright-line rules such as dog rules, cat rules, and parakeet rules. Family Code Section 2605 is not helpful, for its definition of care as “food, water, veterinary care, and . . . shelter”⁷³ is too basic. An animal could have food, water, veterinary care and shelter and still be suffering abuse.

By adopting the definition of animal abuse proposed in this Article, the legislature can give judges both a standard in tune with evolving norms of animal welfare and the discretion they need to address the vast universe of pets who will presently be appearing in courtrooms. The definition reads as follows, “Animal abuse occurs when a party engages in behavior that deprives an animal of the conditions it needs to flourish. Such behavior includes, but is not limited to, separating the animal from the human who is its primary caretaker or companion.” The first sentence of the definition focuses on the needs of the animal; the second focuses on the needs of the human.

III. Animal Welfare and Animal Abuse

The proposal in Part II(D) of this Article that the civil definition of abuse should be based on a finding of deprivation of the conditions an animal needs to flourish is based on the work of the philosopher Martha Nussbaum, which in turn is based on the work of academics from many other disciplines throughout the twentieth century. Although medicine and psychology led the way, scholars in the humanities and social sciences have also contributed, re-thinking established tropes on the status of animals relative to humans. Their contributions are considered here to explain the theoretical underpinnings of this Article’s proposal for a new civil definition of animal abuse.

72. See, e.g., Stanley H. Weitzman & Lynne R. Parenti, *Fish: Animal*, ENCYCLOPEDIA BRITANNICA, www.britannica.com/animal/fish [<https://perma.cc/D6BX-NQ8C>] (discussing how the five most well-known classes of vertebrates (animals with backbones) are mammals, birds, fish, reptiles, and amphibians).

73. CAL. FAM. CODE § 2605 (West 2019).

Animals have been classified as property since the earliest years of Western law⁷⁴ and are still so classified in the majority of U.S. states, California included.⁷⁵ In the early years of the United States, companion animals other than highly valuable horses or breeding animals had less value in the eyes of the law than a stick of furniture. Rather confusingly, in light of the property status of animals, animal welfare nonetheless became a subject of legislative attention in the mid-nineteenth century.⁷⁶ Early legislation focused on the welfare of work animals and factory-raised animals—animals that had commercial value.⁷⁷ Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals,⁷⁸ is widely thought to have been responsible for the most progressive law of this genre, the New York Act of 1867.⁷⁹ The New York Act, Section 1, provided for the law to apply to “any living creature.”⁸⁰ However, little to no attention was given in practice to the welfare of companion animals, perhaps because they were assumed to be adequately protected by the humans who made up the domestic unit in which they lived, an assumption often invalid in households blighted by domestic violence.

The twentieth century popularized the concept of human and animal rights. The United Nations’ adoption of the Universal Declaration of Human Rights⁸¹ in 1948 and its subsequent enactment of the International Covenant on Civil and Political Rights⁸² and the Interna-

74. Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 492 (1996).

75. See, e.g., CAL. CIV. CODE. § 655 (West year); *Kimes v. Grosser*, 195 Cal. App. 4th 1556, 1559 (2011).

76. For a discussion of legislative developments relating to animal cruelty laws, see David Favre & Vivien Tsang, *The Development of the Anti-Cruelty Laws During the 1800’s*, 1993 DET. C.L. REV. 1 (1993).

77. *Id.*

78. *History of the ASPCA*, ASPCA, <https://www.aspc.org/about-us/history-of-the-aspc> [<https://perma.cc/W3CR-N37R>] (Bergh is generally said to have found his calling as an animal advocate when, while on assignment to Moscow as a diplomat in 1863, he encountered an exhausted and fallen carriage horse being beaten by its driver in Moscow and successfully intervened to stop the beating).

79. SYDNEY H. COLEMAN, *HUMANE SOCIETY LEADERS IN AMERICA* 45–46 (1924), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015003653550;view=1up;seq=5> [<https://perma.cc/DRT6-N4PS>] (ebook).

80. N.Y. AGRI. & MKTS § 353 (West 2005) (citing N.Y. REV. STAT. § 375 (1867)).

81. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (signed in 1966 and effective in 1976).

82. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (signed in 1966 and effective in 1976).

tional Covenant on Economic and Cultural Rights⁸³ touched off the growth of the international human rights movement and, in the United States, the animal rights movement. The animal rights movement in its inception focused on making claims for animals analogous to those being made for humans.⁸⁴ The stumbling block in the United States was that courts and the public proved resistant to conferring rights on animals, on the ground that it is humans, not animals, who are born with inalienable rights and animals are not persons in the eyes of the law⁸⁵—they are property.⁸⁶

Philosophers and legal scholars argued the case for legal personhood for animals.⁸⁷ After all, if corporations can be legal persons, why not animals, who are sentient creatures exhibiting many human characteristics? But by the beginning of the twenty-first century, it had become apparent in the United States that changing society sufficiently to accept personhood and rights for animals was a long-term project.⁸⁸ For example, in the 2012 case of *Tilikum v. Sea World*,⁸⁹ the

83. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

84. See Joel Feinberg, *Can Animals Have Rights?*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 194 (Tom Regan & Peter Singer eds., 1976); Joyce S. Tischler, Comment, *Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats*, 14 SAN DIEGO L. REV. 484, 496 (1977); Roger W. Galvin, *What Rights for Animals? A Modest Proposal*, 2 PACE ENVTL. L. REV. 245, 252 (1985); Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COL. HUM. RIGHTS L. REV. 259, 280 (1987).

85. The social contract theory that underlies western law is that humans make laws to govern the behavior of humans; however, as Nussbaum notes, there is no reason that humans cannot make law that governs human-animal relationships. MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 347 (2007).

86. The similarity to the legal treatment of slaves in the eighteenth century is startling. See, e.g., NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 214 AT N, 48–50 (2017), discussing Madison's legal objections to slavery; see also Gary L. Francione, *Animals – Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 122–23 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

87. See, e.g., Anne Benvenuti, *Evolutionary Continuity and Personhood: Legal and Therapeutic Implications of Animal Consciousness and Human Unconsciousness*, 48 INT'L J. OF L. AND PSYCHIATRY 43, 47 (2016). For an eloquent statement of the position that animals should be seen as moral persons, see Francione, *supra* note 86 at 131–32.

88. Alexandra Farone, *Argentina court Recognizes orangutan as “non-human person”*, JURIST (Dec. 22, 2014, 10:22 AM), <https://www.jurist.org/news/2014/12/argentina-court-recognizes-orangutan-as-non-human-person/> [<https://perma.cc/2L6S-ETLH>]. In early July 2018, the High Court of Uttarakhand in India declared animals to be legal persons. Apoorva Mandhani, *Uttarakhand HC Declares “Entire Animal Kingdom” As Legal Entity, With Rights, Duties & Liabilities Of A Living Person [Read Judgment]*, LIVE LAW.IN (July 4, 2018, 5:46 AM) <https://www.livelaw.in/uttarakhand-hc-declares-entire-animal-kingdom-as-legal-entity-with-rights-duties-liabilities-of-a-living-person-read-judgment/> [<https://perma.cc/4YHB-FRWE>]. The Uttarakhand decision should be approached with a wait-and-see attitude, as the Supreme Court of India recently reversed a decision by the same court that had declared the Rivers Ganges and Yamuna to be legal persons. However, New Zealand and

judge decided in favor of Sea World on the ground that orcas (killer whales) are not persons. To be precise, the court dismissed the action for lack of subject matter jurisdiction, finding that the Thirteenth Amendment prohibition on slavery and involuntary servitude applied only to humans, and thus orcas lacked Article III standing to bring an action against the Sea World park operator under the Thirteenth Amendment.⁹⁰

Once again, the philosophers and legal scholars stepped forward, advocating an animal-welfare approach that would, hopefully, provide more immediate protection for the welfare of animals than the claim of personhood and rights had proved able to do.⁹¹ The stance of the welfare-theory advocates is that animals have an interest, not a right, in being free from pain and suffering and humans have a moral obligation to treat them humanely. What constitutes humane treatment was, and is, open to debate. One respected school of welfare-theory thought is that humane treatment means providing animals with conditions of life that allow them freedom to express their most natural behaviors or, otherwise put, conditions that allow exercise of their natural capabilities.

The theory that animal welfare is predicated on animals being able to express natural behaviors was first formally articulated in the United Kingdom in 1965 in a document popularly known as “the Brambell Report”⁹² which posited that farm animals should have certain freedoms. As developed by an advisory group to the government’s Department of Environment, Food and Rural Affairs, it has evolved to the current proposal that “Five Freedoms” be assessed to determine whether an acceptable level of animal welfare has been met. The Five Freedoms include freedom from thirst, hunger and malnutrition, freedom from discomfort, freedom from pain, injury and disease, freedom from fear and distress, and freedom to express most normal

Australia have conferred the designation of legal person on components of ecosystems such as rivers. *E.g.*, Erin L. O’Donnell & Julia Talbot-Jones, *Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India*, 23 *ECOLOGY & SOCIETY* 7, 10 (2018); see Geeta Shyam, *The legal status of animals: The world rethinks its position*, *ALTERNATIVE L.J.* (2015), <https://www.altj.org/feature-articles/980-the-legal-status-of-animals-the-world-rethinks-its-position> [<https://perma.cc/3B3D-6NMD>].

89. *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259, 1263 (S.D. Cal. 2012) (*Tilikum* was one of the orcas featured in the 2013 documentary *Blackfish*).

90. *Id.* at 1264–65.

91. See JOAN E. SCHAFFNER, *INTRODUCTION TO ANIMALS AND THE LAW* 171–72 (2011).

92. F. W. ROGERS BRAMBELL, *REPORT OF THE TECHNICAL COMMITTEE TO ENQUIRE INTO THE WELFARE OF ANIMALS KEPT UNDER INTENSIVE LIVESTOCK HUSBANDRY SYSTEMS* 13 (1965).

behavior.⁹³ In the United States, the idea that the well-being of an animal could be determined by whether the conditions of its life allowed expression of normal behavior such as movement has been responsible for much of the recent legislation requiring that the cages of farm animals such as hens, pigs, and calves provide sufficient room for them to stand, turn, and lie down.⁹⁴ What has not yet been done is to adapt the expression-of-natural-behaviors approach to the conditions of life of companion animals.

The work of Martha Nussbaum provides the opportunity to do so. In her analysis, the capabilities that animals should be free to express include, where appropriate, the ability to form a bond with a human.⁹⁵ The capabilities approach to freedom was initially developed by Nobel prizewinner Amartya Sen to evaluate the conditions of life of humans in developing nations.⁹⁶ Nussbaum, Sen's colleague, expanded its scope to include animals.⁹⁷ Her analysis is sufficiently nuanced to evaluate the welfare of companion animals of all sorts and offers the hope of legal standards that can fully protect animals without having to deal with controversial questions of legal personhood or animal rights.

In the hands of Nussbaum, the starting point of the capabilities approach is the Aristotelian idea that all of nature is a continuum, and all creatures within it are worthy of respect.⁹⁸ Next comes the concept of dignity. Both humans and animals are entitled to live a life of dignity,⁹⁹ a life supported by the conditions that allow both humans and non-human animals to activate the capabilities with which they are

93. *Five Freedoms*, FARM ANIMAL WELFARE COUNCIL, <https://webarchive.nationalarchives.gov.uk/20121010012427/http://www.fawc.org.uk/freedoms.htm> [<https://perma.cc/2NJZ-ZABV>] (last modified Apr. 16, 2009). On the somewhat controversial subject of freedom to express most normal behavior, see Marian Stamp Dawkins, *Battery Hens Name Their Price: Consumer Demand Theory and the Measurement of Behavioral Needs*, 31 *ANIMAL BEHAV.* 1195, 1195 (1983); see also B. O. Hughes & I. J. H. Duncan, *The Notion of Ethological Needs, Models of Motivation and Animal Welfare*, 36 *ANIMAL BEHAV.* 1696 (1988); G. Mason & M. Mendl, *WHY IS THERE NO SIMPLE WAY OF MEASURING ANIMAL WELFARE?*, 2 *ANIMAL WELFARE* 301 (1993) (discussing the physiological and behavioral changes that can indicate an animal's welfare).

94. CAL. CONST. ART. 2, § 18 (2018).

95. See *infra* note 109.

96. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) (discussing the importance of development to substantive freedom).

97. See MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 346 (2006). Nussbaum's work began in development economics relating to women. E.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* xv (1999).

98. NUSSBAUM, *supra* note 6, at 93–94.

99. *Id.* at 70, 392.

born, at least to a minimum threshold level.¹⁰⁰ If a being is a non-human animal, its entitlements are species-specific and based on its species' characteristic forms of flourishing.¹⁰¹ What we are looking for is "the characteristic flourishing of a creature of a certain kind,"¹⁰² say a dog or a parakeet. Life, bodily health, and bodily integrity, in the sense of freedom from physical violence, are the basics.¹⁰³ The full list of the capabilities of sentient non-human animals is a work in progress, but includes the ability to use the senses, to play, and to affiliate (or not), each in a manner characteristic of the species in issue.¹⁰⁴ The conditions of life should be such as to allow a being to flourish according to his or her capabilities.¹⁰⁵ The focus is limited to enabling or protecting the well-being of an individual creature, not creating a comprehensive concept of good animal lives.¹⁰⁶ The focus on the individual animal is one of the reasons that the capabilities standard is well-suited to inclusion in a family code's definition of animal abuse.

For the dogs and cats who comprise the majority of companion animals, the capability to feel emotion and to affiliate is critical. Animals are entitled to opportunities to form attachments, with other animals and with humans, to engage in characteristic forms of bonding and interrelationship, and not to have those attachments warped by enforced isolation or the deliberate infliction of fear or pain.¹⁰⁷ Thus, the human-animal bond protected.

How does this relate to protective orders for animals? In two ways. First, the ethical judgment entailed is "that it is wrong when the flourishing of a creature is blocked by the harmful agency of another."¹⁰⁸ Second, the standard for judgment is whether the respondent's actions have deprived the animal of the conditions it needs to flourish. The obvious cases are acts of commission: killing an animal, using physical violence on an animal, depriving an animal of adequate food or water, or restricting its movement so it cannot use its senses. The less obvious cases are acts of omission: failing to give an animal adequate exercise, failing to give it necessary environmental stimulation,

100. *Id.* at 75.

101. *Id.* at 392.

102. *Id.* at 94.

103. *Id.* at 393–95.

104. *Id.* at 397–400.

105. *Id.* at 351.

106. *Id.* at 352; *see generally* CHRISTINE M. KORSGAARD, *FELLOW CREATURES: OUR OBLIGATIONS TO THE OTHER ANIMALS* (2018); *see also* Thomas Nagel, *What We Owe A Rabbit*, *LXVI N.Y. Review of Books* 42–43 (Mar. 21, 2019).

107. *Id.* at 397.

108. *Id.* at 349.

failing to give it access to animals or humans with whom it has bonded. All of these acts, whether commission or omission, would block the animal from flourishing. It is not coincidental that the actions described would also block the flourishing of a human. These behaviors would constitute abuse of the animal and, to the extent that its bonded human partner knows of them or is simply deprived of access to the animal, constitute abuse of the human.

This Article's proposed code amendment defining animal abuse ("To engage in behavior that deprives a pet animal of the conditions it needs to flourish. Such behavior includes, but is not limited to, separating the animal from the human who is its primary caretaker or companion.") mirrors the practice, already in place in the nonlegal world, of maintaining the human-animal bond. For example, animal shelter administrators hold newly-arrived animals for several days before allowing adoption, to enable owners to find their strays, but also to safeguard against the frequent cases in which the spouse or partner in a domestic relationship appears at a shelter to relinquish an animal, then is followed several hours or a day later by the frantic other spouse or partner desperately searching for the very same animal. Another example of a practice that preserves the human-animal bond is provided by those animal shelters and animal advocacy groups which fund and administer programs that keep humans and animals together by providing no-cost food and health care to the companion animals of home-bound seniors and homeless persons. When future sections of the California codes are enacted to provide the stamp of governmental approval to new social practices concerning animals, care should be taken to ensure that the best practices of society, such as those just described that preserve the human-animal bond, are the ones endorsed, in the interests of both the humans and the animals.

The major non-legal contributions to the development of animal welfare law and hence to the search for a workable definition of abuse have come from social sciences (the theory of rights¹⁰⁹) and philosophy. The philosophers have, through the capabilities approach, provided the standard against which to evaluate facts indicating that an

109. See generally Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 ANIMAL L. 75 (1997) (explaining how utilitarian theory has aided the evolution of animal welfare through the theory of rights).

animal is being abused and the theory that justifies viewing animals as sentient beings having legally protectible interests.¹¹⁰

Conclusion

Much has been accomplished and much remains to be done. California law has, through the statutory changes described in Part II of this Article, taken a significant step toward preventing animal abuse attendant on the break-up or dysfunction of domestic relationships. It has also recognized the human-animal bond and the need, in the interests of the humans involved, to protect it, much as the law protects significant human-human relationships such as parent-child or husband-wife. Further, the legislature has de facto recognized the link between domestic violence and animal abuse.

A. Immediate Needs

Community Education

Implementing a new law is often more difficult than passing it. There can be a lag time of a decade or more between the enactment of a law and its full implementation. The first step of implementation is educating law enforcement, the bench, and the bar about the provisions of a new law, the legislative intent behind it, and the social and scientific changes that necessitated it. In this case, education of the relevant social service organizations and the personnel of animal shelters and animal welfare societies will also be necessary.

Shelter and Housing

As previously stated, the short-term practical impact of the new California Family Code sections will be the need for additional housing for survivors of domestic violence or abuse who feel empowered to leave and bring their companion animals with them. Several independent studies have reported that between 18 and 48% of battered women have delayed their decision to leave their abusive partner, or have returned to their abusive partner, out of fear for the welfare of their pets or livestock.¹¹¹ Statistics such as these mandate development

110. See Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1540 (2001) (book review).

111. Elizabeth A. Collins et al., *A Template Analysis of Intimate Partner Violence Survivors' Experience of Animal Treatment: Implications for Safety Planning and Intervention*, 24 VIOLENCE AGAINST WOMEN 453, 455 (2017); Jennifer L. Hardesty et al., *Coercive Control and Abused Women's Decisions About Their Pets When Seeking Shelter*, 28 J. INTERPERS. VIOLENCE 2620 (2013); MICHAEL ROGUSKI, PETS AS PAWNS: THE CO-EXISTENCE OF ANIMAL CRUELTY AND FAMILY VIO-

of mechanisms to keep at least the pets of these women safe in order to keep the women safe. And now that the California legislature has extended the protection of the law to the pets of abused elders and juveniles, it is likely that in many cases shelter will need to be found for the companion animals of members of these new vulnerable groups.

The period immediately after flight from an abuser is when victims of domestic violence, be they adults or children, are most in need of the emotional and physiological support their companion animal can provide. Keeping the animal with them has an additional benefit; it relieves them of the burden of anxiety over how their animal is faring in the keeping of the abuser. For these two reasons it is important to keep companion animals with the humans who depend on them for emotional sustenance. But how? Pet protection and custody orders are only the first step. Next is the need for a place that will house them, all of them, including the animal. Finding such a place is perhaps even more difficult than obtaining a protective order. In most situations the victim will have fled without first obtaining protective orders.

There are six major models for keeping victims and their companion animals together, some far more successful than others. First, most desirable and least obtainable, is a shelter that houses both humans and animals, allowing companion animals to share a room with their families. Such shelters are few and far between due to the concerns of shelter operators about hygiene and safety. Second is a shelter that allocates a spare room where pets can be kept in their crates. Family members must, of course, feed and water them and take them outdoors for exercise. Third is the shelter that has outdoor kennels. Fourth is the shelter that has a cooperative agreement with a nearby independent animal shelter or dog daycare business to house the companion animals of the domestic violence shelter residents.¹¹² As a group, these animal shelters are known as Safe Houses or Safe Havens.¹¹³ Fifth is providing the victims with vouchers to pet-friendly

LENCE vii, 6–7, 30, 44 (2012), <http://www.communityresearch.org.nz/wp-content/uploads/formidable/Pets-as-Pawns-Research-Report-Final.pdf> [<https://perma.cc/2Z9B-PFHY>].

112. AKC Canine Legislation Position Statement Protects Pets of Domestic Violence Victims and Ownership Rights, AM. KENNEL CLUB, <https://www.akc.org/clubs-delegates/government-relations/government-relations-blogs/akc-legislative-position-statement-protects-pets-domestic-violence-victims-ownership-rights/> [<https://perma.cc/YJ8L-5BYX>].

113. Frank R. Ascione et al., *Animal Abuse and Developmental Psychopathology: Recent Research, Programmatic and Therapeutic Issues and Challenges for the Future*, in HANDBOOK ON

hotels and motels. Sixth is placing the companion animals of domestic violence victims with foster families.¹¹⁴ Finding the necessary funds for these programs will be a difficult task, one which can be accomplished by both the public and private sectors, the public sector by legislation that includes a funding mandate for shelter house programs and the private sector through foundation grants and individual donations.

B. Future Developments

The future impacts of the findings in human and veterinary medicine, human psychology and animal ethology discussed in this Article are difficult to predict. In the near future, the California legislature will have to come up with a thoughtful and informed civil definition of animal abuse justifying the issuance of an animal protection order under the Family Code, the Welfare and Institutions Code, and the Civil Procedure Code. It is likely that any new definition of animal abuse these code sections contain will include the severance or attempted severance by an abuser of a human-animal bond.

In the longer term, new findings in anthrozoology, the science of human-animal interaction, will no doubt be made and popularized. The law will have to adapt and incorporate them. Judicial decisions involving animals will likely move in the direction of a “best interest of the animal” test. Further legal innovations such as pet trusts can be expected. Ultimately, all fields of law will recognize animals as sentient beings having legally protectable interests.

ANIMAL-ASSISTED THERAPY: THEORETICAL FOUNDATIONS AND GUIDELINES FOR PRACTICE 357, 369 (Aubrey H. Fine ed., 3d ed. 2010).

114. Lori R. Kogan et. al, Note, *Crosstrails: A Unique Foster Program to Provide Safety for Pets of Women in Safehouses*, 10 VIOLENCE AGAINST WOMEN 418, 423–26 (2004).